RE T (A MINOR)

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[ORIGINATING SUMMONS NO. 24-510-92]
7 APRIL 1993

FAMILY LAW: Mother applying for custody of child - Principles applicable in deciding custody - Welfare of child of paramount consideration - Whether child's wishes should be taken into account - Matters to be taken into consideration - Child below seven years of age - Whether presumption under s. 88(3) Law Reform (Marriage & Divorce) Act 1976 rebutted - Whether desirable to disturb life of child by changes in custody.

The plaintiff (W) and the defendant (H) were married in 1987 and they had a child (T) in 1988. The plaintiff suffered from mental depression after the birth and was put under medication. From the time of the birth of T upto the hearing of the case, a period of more than 4 years, the plaintiff stayed in the matrimonial home for barely 2 to 3 months and her contact with (T) was practically nil.

T was at all material times looked after by the defendant and his family. The plaintiff brought an action claiming custody of T.

Held:

[1] In deciding in whose custody a child should be placed, the paramount consideration should be the welfare of the child and subject to this the Court shall have regard to the wishes of the child where he or she is of an age to express an independent opinion.

[2] T had been with her father since birth and had only intermitently seen her mother until the hearing of these proceedings. T was not capable of appreciating her situation and expressing an independent opinion of her preferences.

[3] Throughout the period of T's growth W was never quite the mother figure she should have been. W led an unstable life beset with severe mental depression for which she was still under medication. Throughout the period of her child's growth W appeared indifferent to her child and her contact with her child was practically nil.

[4] Inspite of the presumption under s.88(3) of the Act that it is good for a child below seven to be with her mother, it was doubtful if W would have the ability to take care of her child. W would not be competent to fulfil her role as a parent and a mother providing strength and stability to the emotional needs of a young growing child.

[5] The underlying principle is that there should be continuity of care which provides for stability. In the circumstances, to uproot T from a stable environment which she had known all her life and surrender her to an insecure and unknown new environment would be a traumatic experience for her with possible psychological damage.

[6] Having regard to the principle that the paramount consideration is the welfare of the child, this consideration was best served by her remaining in the custody of her father. T should always have contact with her mother and the mother, her child and W was entitled to access to T.

[Plaintiff's application for custody dismissed with no order as to costs].

Cases referred to:

Manickam v. Intherahnee [1985] 1 MLJ 56 at 57 ***(refd)***
Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189 at 192 / [1983] 1 CLJ 124 ***(refd)***
J & Anor. v. C & Ors. [1970] AC 668, 710 - 711 ***(refd)***
Amar Kaur a/p Ram Singh v. Najar Singh a/l Sagar Singh [1991] 1 CLJ 294 at 296 ***(refd)***
In Re Thain (An Infant) [1926] Ch 676 ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, s. 88(2), (3)

For the plaintiff - Tan Chen Sin; M/s. Ramli & Amarjit
For the defendant - Choe Kuan Him; M/s. Choe & Shakri

JUDGMENT

K.C. Vohrah J:

In this case I dismissed the plaintiff's application for custody of her child and I awarded the custody of the child to the defendant, the father of the child. I allowed the plaintiff access to her child under certain conditions.

Background

T is a child of 4 years 7 months of age. She lived in her father's family home ever since her birth. Her mother, the plaintiff, permanently moved out of that house in August 1990 some 2 years ago.

The plaintiff sought an order for the custody and care of her child, T, and other consequential reliefs.

In deciding in whose custody a child should be placed "the paramount consideration", according to s. 88(2) of the Law Reform (Marriage and Divorce) Act 1976 (the Act), "shall be the welfare of the child" and subject to this the Court shall have regard to the wishes of the parents of the child and to the wishes of the child where he or she is of an age to express an independent opinion. In this case since the child is merely 4 years 7 months old the Court had also to take into account a rebuttable presumption under s. 88(3) that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether the presumption applies to the facts of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

There is no dispute that the plaintiff, W, and the defendant, H, were happy with their marriage before the birth of T. They were married in 1987 and both lived in the shophouse belonging to H's family. W and H had a room on the top floor of the shophouse. There were, however, others who lived in the shophouse, H's parents and his other relatives including an elder spinster sister.

There is no dispute that trouble started after W gave birth to T in August 1988. It is not disputed that she had to go to a private hospital in Alor Setar for observation and that she was not capable of looking after the baby. Nor is it disputed that she suffered from se-vere mental depression - this is clear from the medical report of a consultant psychiatrist from a hospital in Penang and another medical report of a physician practising in Alor Setar both of whom she consulted for treatment. She consulted the psychiatrist on 5 occasions from 1988 through to 1990. She consulted the Alor Setar physician in April 1990 and she came under the care of this physician for over 2 years. She was given tranquilizers and anti-depressants by both physicians to control her illness and even till the day of the hearing W admitted that she took medication every night to calm herself. It has to be noted that the consultant psychiatrist has been careful to state there is no evidence of any mental instability in her. There were vague allegations of a hearsay nature by the defendant that she had suicidal tendencies but both the physicians were of the view that there was no evidence to support that.

W put the blame for the breakdown of her marriage on the elder spinster sister of H. She alleged that this sister-in-law was an overbearing woman and that the woman was critical of her and that she took charge of the baby and refused to allow her to take care of her. She made several allegations against this sister-in-law of interference with her marriage and the care of the baby and of continual harassment. In her affidavit evidence she blamed this sister-in-law with specific ins-tances of interference and harassment but in her evidence, which was confused and rambling, she shifted ground and blamed her mother-in-law for some of the specified instances of interference and then blamed both of them and then the sister-in-law again. There is some truth, I think, in the plaintiff's allegation that her spinster sister-in-law was overbearing and that she was critical of her but it was the plaintiff's unfortunate illness, as will be seen later, that was principally the cause of her unhappiness and problems in the matrimonial home. It would be fair to state, however, that the husband regretably did not appear to be of strong mettle and it did appear that he did not prevail over his sister and his mother to be more considerate with the plaintiff.

The evidence showed that shortly after the delivery of the baby W would not cope with the responsibilities of motherhood because of her severe mental depression and it was her mother-in-law and sister-in-law who took over the night and even day care of the baby. W admitted she could not take care of the baby at night. When she left the matrimonial house for her mother's house a few days after giving birth to T, she left without taking T; the evidence was that W's mother had gone to H's house and had stated that she herself could not look after the child as she had other grandchildren to look after while W did not request for the baby to be brought to her mother's house.

The evidence also showed that the plaintiff was persuaded to return home after an absence of about 1 1/2 months. She stayed for

about 2 months in the matrimonial home, was admitted to a private hospital in Alor Setar on 21 December 1988 for observation for 3 days and then she was brought back to her mother's house at her request. Again the child was left behind with H and his family. W said she (W) was not well. At the end of January in 1989 before the Chinese New Year celebrations W returned to the matrimonial home at about 11 a.m. for a few hours. She looked after her child for a short while. She complained she was not allowed to look after the child. H on the other hand said that W handed the child back to his mother complaining of being unwell. H's story, to my mind, is more probable given the fact that W was still suffering from depression. W then left at 1 p.m for her mother's home. A week later she went back to the matrimonial home and stayed there for the Chinese New Year celebrations for 3 days when again she left for her mother's house; and again she did not ask for her child to be brought back.

From that day up to August, 1990 when she permanently left the matrimonial home her absence from the matrominial home became more frequent and longer and her contact with her child was practically nil and more probably because of her illness she appeared indifferent in her attitude to her child. On 19 May 1987 H moved out of his family home to live with W in another place at her request which arrangement lasted for 1 week; she then went to her mother's house.

In September 1989 she returned to the matrimonial home and stayed there for one night. There a disquieting event took place. W felt depressed. H stated in his affidavit (see paragraph 2 of the affidavit affirmed by H on 5 October 1992), and that statement has not been contradicted, that W told him that she felt like throwing the child down from the top floor of her matrimonial home.

From September 1989 to January 1990 W stayed with her mother and while she did make inquiries about the child she did not, according to H, and I believe him, show any deeper interest for her. On 26 January 1990 H brought W back to this house but sent her back to her home on 27 January 1990 at the request of W's mother. On 8 June 1990 W returned to the matrimonial home and went for her weekly visits to a consultant physician in Alor Setar for treatment. She then requested H to move out and start a business. H refused and on 19 August 1990 she permanently moved out from the house.

It is clear from her oral evidence and the affidavit evidence of herself and H and the reports of the doctors that the main problem faced by W, her main reason for being unable to cope with her responsibilities as a mother was the severe mental depression that she suffered after she gave birth to T.

It is so clear that during her lone period of illness she did not, in fact she could not, take care of her child T. She had hardly any contact with her child. It was H and H's family who cared after T. It is sad but the child did not even recognise her; T was brought into my chambers at my request and both H and W were present in the chambers but T paid no attention to W at all and asked if she could sit with her father.

Welfare Of Child Of Paramount Consideration

In deciding in whose custody a child should be placed, "the paramount consideration", according to s. 88(2) of the Act, as stated earlier, shall be the "welfare of the child" and subject to this the court shall have regard to the wishes of the child where he or she is of an age to express an independent opinion. I also had to bear in mind that in this case since T is 4 years 7 months old the Court had also to take into account the rebuttable presumption under s. 88(3) of the Act that it is for the good of a child below the age of seven years to be with his or her mother; however, in deciding whether the presumption applies to the fact of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

Child's wishes

T appeared bright and happy. She appeared to be very comfortable with her father but as mentioned earlier she did not appear to recognise her mother when she (T) was brought into my chambers in the presence of both the parties and their Counsel. I must state I did not think that unusual as she had been with her father since her birth and had only intermittently seen her mother for the first three years and since then she had

not seen her mother for 2 years until the hearing of these proceedings. In view of that factor and that she is of tender age and bearing in mind *Manickam v. Intherahnee* [1985] 1 MLJ 56 at 57, I did not think it necessary to ask her with whom she wished to stay. I did not think she was capable of appreciating her situation and expressing an independent opinion of her preferences.

Matters to be taken into consideration

In *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189 at 192 Ajaib Singh J. (as he then was) commented on the concept of "first and paramount consideration" and the matters that would have to be taken into account:

> The question for my determination now is: who should get the custody of the children - the plaintiff father or the defendant mother? It is well established that in an application for the custody of a child the Court will in exercising its discretion regard the welfare of the child concerned as the first and paramount consideration. It is equally established that this does not mean that the court will not take other relevant factors into consideration. Indeed in order to decide on the question of the welfare of an infant as of paramount importance it is necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his wishes as far as they can be ascertained depending on the age of the child, the confidential reports which a social welfare officer may put up and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than with the other. But always it is the welfare of the child which is of paramount importance.

At page 193 Raja Azlan Shah CJ (as His Majesty was then) elaborated on the concept further:

> The learned Judge approached the matter by considering the welfare of the children as the first and paramount consideration. The phrase 'first and paramount consideration' does not mean that one should view the matter of the children's welfare as first on the list of factors to be considered, but rather that it must be the overriding consideration. We think that it connotes a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the children's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed. (per Lord MacDermott in *J & Anor. v. C & Ors.* [1970] AC 668, 710 - 711).

Rebuttable presumption that it is for good of child below 7 to be with mother

Among the relevant considerations the court had to look into were factors relating to the child's physical, educational and emotional needs but the "paramount consideration" was the child's welfare.

I have no doubt that both parents will adequately provide whatever the physical needs of the child will be. As for her educational needs she is in kindergarten now and she would be going to primary school after that. I do not think either parent will not provide the best for her schooling.

Great weight however has to be placed on the child's emotional needs (see *J & Anor. v. C & Ors.* cited earlier) and in this context I have to take into account the rebuttable presumption that it is for the good of the child below 7 to be with her mother but in deciding whether the presumption applies I have also to take into consideration to the undesirability of disturbing her life by changes in custody.

In this context too it is pertinent to note the observation of Abdul Malek bin Hj. Ahmad J in *Amar Kaur a/p Ram Singh v. Najar Singh a/l Sagar Singh* [1991] 1 CLJ 294 at 296:

> Despite the trend of cases where the custody of children of tender years is given to the mother, since the paramount consideration is the welfare of the children, **the ability of the relevant parents to take care must merit attention**. It is pertinent to refer to some authorities where the mother has not been given custody of young children, although the facts are not exactly on point, to illustrate that custody need not necessarily have to be given to the mother in every case. In *Wong Kwong Siong v. Ling Pik Ngiik* [1972] 1 MLJ 116, the mother was found to be suffering from chronic schizophrenia and was not able to look after the two young sons while in *Lee Soh Choo v. Tan Ket Huat* [1987] 1 MLJ 255, the court observed that the mother in having to work to maintain herself was not in a position to devote her full attention to her two young children, who were living with the father, and as regards whom she was not

decided as to whether to send them to her mother in Kedah or to her brother and his wife in Kuala Lumpur. (emphasis added)

In our case throughout the period of the child's growth W was never quite the mother figure she should have been. W led an unstable life beset with severe mental depression and the Alor Setar physician did point out that for the last 2 years before October 1993 she still exhibited cyclical phases when her mood was low. She was still under medication during the hearing. Throughout the period of the child's growth W appeared indifferent to her child. From the time she gave birth to T in August 1988 till the hearing of the case - a period of about 4 years 7 months - she stayed in the matrimonial home barely 2 to 3 months and her contact with her child was practically nil. Although the doctors stated in October 1992 in their reports that she was fit to look after her child yet at the back of my mind was the doubt that they were seised of all the evidence that was revealed before the court and there was also the matter of the uncontradicted statement of her husband that some 2 years ago while she was in one of her depressed moods she told him that she felt like throwing the child down from the top floor of the shophouse. Then again during her evidence in court she appeared confused and inconsistent and at times she rambled on on matters she was not asked about.

In the circumstances I was doubtful if she would have the ability to take care of her child. I was far from confident that W would be competent to fulfil her role as a parent, and, in her case, as a mother, providing strength and stability to the emotional needs of a young growing child.

Undesirability of disturbing life of child below 7 by changes of custody

In the case of *In Re Thain* (*An Infant*) [1926] Ch 676 the question arose as to whether a six year old girl who had been brought up from infancy by an uncle and aunt should be returned to the care of her father. Eve J in an often quoted passage admitted that "the little girl will be greatly distressed and upset ... but, at her tender age, one knows from experience how mercifully transient are the effects of partings and other sorrows ... and I cannot attach much weight to this aspect of the case." The child was given to the care of her father. As against this case reported in 1926 is this case reported in 1970, the House of Lords' case of *J. & Anor. v. C & Ors.* (cited earlier) where the issue was whether a 10 year old child should be returned to his "unimpeachable" natural parent in Spain or he should continue to be in the care of the English foster parent who had looked after him for most of his life. It was held that to return a child who had been brought up as an English boy with English ways to a strange environment and to parents who would have had difficulty in coping with his problems of readjustment would be inconsistent with his welfare. The House of Lords also held that the "welfare" test applied even when the dispute was between unimpeachable parents and someone who had no biological or legal links with the child at all.

In any event the statement of Eve J has to be understood in the context of the caveat in s. 88(3); where custody is sought to be given to the mother of a child aged below 7 making use of the presumption in s. 88(3) even if the mother is otherwise suitable the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. The underlying principle is that there should be continuity of care which provides for stability. And in the particular circumstances of this case to uproot T from a stable environment which she had known all her life since birth and surrender her to an insecure and unknown new environment would be a traumatic experience for her and one cannot forsee what psychological damage will ensue for the girl; and the court did not think it wise to order a change in custody.

Considering all the circumstances I was of the view, having regard to the principle that the paramount consideration is the welfare of the child, that this consideration was best served by her remaining in the custody of her father. I therefore dismissed the application of the plaintiff for the custody of the child. I made no order as to costs.

Access

I think the child should always have contact with her mother and the mother, her child. I made the following orders relating to access and I impressed upon the defendant that he

was not to allow his relatives to interfere with the rights of access of the plaintiff -

1. For the school holidays during the puasa period and the Hari Raya celebration and the next school vacation, 28 May 1993 to 16 September 1993, the mother shall have access to the child every Friday, Sunday and Tuesday from 9 a.m. to 7.30 p.m. at her husband's home;

2. When school is not on vacation for 1993 the mother shall have access to the child every Friday from 9 a.m. to 7.30 p.m. at her husband's home;

3. At the next school vacation in August 1993, 20 August 1993 to 28 August 1993, and other school vacations in 1993 and 1994 and thereafter the mother shall have access to the child every Friday, Sunday and Tuesday from 9 a.m. to 7.30 p.m. at her husband's home but on Fridays the mother may take out the child provided the mother is accompanied by an adult of the mother's choice;

4. When school is not on vacation for 1994 and thereafter the mother shall have access to the child every Friday from 9 a.m. to 7.30 p.m. and she may bring the child out for the same time period provided she is accompanied by an adult of her (mother's) choice. There shall be liberty to apply.

SOO SHIOK LIONG

v.

PENDAKWA RAYA

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL APPLICATION NO. 44-16-93]
12 APRIL 1993

CRIMINAL LAW AND PROCEDURE: Charge under s.108 Penal Code - Trial Court allowing bail - Application for reduction of bail amount - Principles applicable - Preparation of affidavits by Counsel - Inclusion of statements found to be untrue - Duty of Counsel to Court.

The applicant was charged with abetting in the commission of 13 offences of criminal breach of trust. The trial Court granted bail bond in two sureties in the sum of RM1,000,000 conditional upon his surrender to the Court of all his travel documents.

The applicant applied by way of notice of motion for the reduction of the amount of bail bond. The applicant obtained an early hearing date by the use of a certificate of urgency on the grounds that he was not in good health. There was in fact no evidence of ill health. The applicant filed an affidavit in support of the notice of motion which was subsequently found to contain untrue statements.

[Ed. Note: The following paras of the headnote were provided by His Lordship Vincent Ng Kim Khoay JC**].**

Held:

[1] Quite correctly, the Court below did not impound the applicant's International Passport. This, the Court is not empowered to do under s. 388 of the Criminal Procedure Code, though it may set certain conditions to granting of bail.

[2] Considering that it has now become a common practice for Counsel to file certificates of urgency in criminal as well as civil cases without sufficient justification, courts would have to be concerned to ensure the authenticity of such claims of urgency by Counsel.

[3] This court is of the view that while there is no obligation placed on Counsel, when preparing affidavits, to verify the truth of statements affirmed by their clients in their affidavits, it is nevertheless the duty of Counsel, as